

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1262

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1262

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

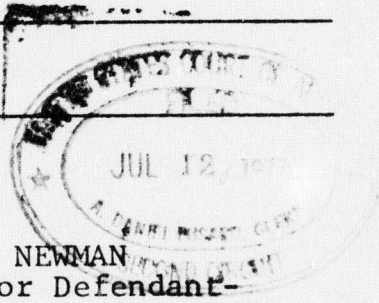
THEODORE G. DALEY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The defendant THEODORE G. DALEY appeals from a judgment of the United States District Court for the Southern District of New York (Lasker, J.) entered upon a jury verdict convicting him of conspiracy to violate and violating the Hobbs Act (18 U.S.C. 1951), and five counts of receiving goods and

services of value in violation of the Landrum-Griffin Act (29 U.S.C. 186(b)(1), (d)).

On May 6, 1977, Honorable Morris E. Lasker sentenced the defendant to a suspended sentence, three years probation and a \$25,000 fine. The defendant is at liberty pursuant to a stay issued by the trial court.

The indictment, docketed below as 76 Cr. 708, charged defendant with conspiracy to violate and violating the Hobbs Act (18 U.S.C. 1951) and with five counts of receiving goods and services of value in violation of 29 U.S.C. 186(b)(1), (d). The indictment appears at p.A-4 of Appellant's appendix.

Because Judge Lasker imposed concurrent sentences, this Court has the discretionary power to decline to review those points of Appellant's brief which deal either with the insufficiency of evidence or legal error relating to the Hobbs Act count. See, United States v. Mejias, 522 F.2d 435, 444-445 (2d Cir. 1977). Review of these errors is sought not merely because of the Circuit-wide impact which the issues possess, but also because defendant's conviction for violating the Hobbs Act has the collateral consequence of banning him from holding union office pursuant to 29 U.S.C. 504. See also, Hodgson v. Chain Service Restaurant, 355 F.Supp. 180 (S.D.N.Y. 1973). This disqualification statute and its affect upon defendant provides an ample basis to consider all of the issues raised on the merits.

STATEMENT OF FACTS

THEODORE G. DALEY was the secretary-treasurer and principal officer of Teamster's Local 445 which took in the counties of Westchester, Putnam, Dutchess, Rockland, Orange, Ulster and Sullivan (T-40). Within this geographic area, the union had employment jurisdiction over general freight, construction, furniture, cement plants, brickyards, bus driving industries (T-40).

The union operated various local hiring halls through its elected business agents, all of whom reported back to either of the two union offices in Newburgh and Yonkers, New York (T-46). These business agents were charged with the responsibility of supplying employers with teamster employees upon request (T-46). The assignment process did not operate in a manner such that the business agent would assign workers in a sequential fashion from a list. Rather, different skill requirements for a given job mandated a fluid assignment process (T-46, 47). Below the business agents, in the union hierarchy, were shop stewards (T-47). These positions were filled by the business agent or the secretary-treasurer (T-47).

THE WINDHAM CAMP

Defendant DALEY had his domicile in Wappinger Falls, New York (T-48). In 1968, ANTHONY ALECCA first learned of DALEY'S ownership of property in Windham**, New York up in the Catskill Mountains (T-49).

*DALEY was originally a truck driver. In 1955, he became active in union affairs and was elected secretary-treasurer of Local 445 and ultimately over the years built up the local's membership from 2,000 to 8,000 members (T-130).

**The Windham Camp consisted of a small frame house with two bedrooms, a foyer and kitchen (T-1365). In addition, a pool was installed on the 10 acre mountainous parcel (T-1508). DALEY spent some \$13,000 on his Windham camp (T-1445).

ALECCA accompanied VINCENT LA ROCCA, a member of Local 445, and DALEY to the Windham house to do work on its roof (T-50). Ultimately, the problem with the roof was remedied that summer when a new roof was constructed directly over the ailing, old one (T-51).

In the autumn of 1970, DALEY first discussed his need for equipment, in this case a backhoe, with a front-end loader on it, with ALECCA (T-52). Later, in the summer of 1971, DALEY and ALECCA discussed the need for heavy equipment again (T-53). DALEY needed a small bulldozer but ALECCA claimed he had trouble* finding one (T-53, 54). Ultimately, TONY NACCARATO, a member of Local 445, was found. He had a bulldozer of the appropriate size and a "low boy" truck which was needed to transport the bulldozer over the road from Kingston to Windham (T-55).

About a week or two after NACCARATO'S delivery of the bulldozer, DALEY asked ALECCA if he knew where a larger bulldozer could be obtained (T-62). Once again, a "low boy" was obtained and the machinery transported to Windham (T-63).

In June 1971, DALEY told ALECCA that he had spoken to CLAUSI about obtaining beams for his cabin. DALEY did not know why CLAUSI had been unable to deliver them. ALECCA would find out why (T-88). CLAUSI told ALECCA he would have to speak to Mr. MARCEJE of Callahan Road Improvement Company before the beams could be released (T-88).

*DALEY testified it was he who had the trouble getting local Windham contractors. ALECCA told DALEY he would send over a bulldozer that he, ALECCA, was using up at his house (T-1485-1486). All three local contractors were too busy to accomodate DALEY at that point in time (T-1487, 1490-1491). DALEY denied failing to use local contractors solely because of the price they charged (T-1492).

ALECCA told MARCELIE that the beams were for DALEY and were to be delivered to Windham (T-89). Ultimately, CLAUSI told him that the beams were sent to Windham (T-89).

Later still, DALEY told ALECCA he needed loads of one-inch stone* up at Windham (T-73-74). ALECCA told DALEY that he would see what he could do about it. In this connection, ALECCA spoke to TOM TURCO, the plant superintendent at the Kingston based Hudson Cement Company**. TURCO told ALECCA he would first have to get approval from his supervisor ROBERT GREENE (T-78), before he could approve a donation of ten truck-loads of stone (T-78, 438-440). It was TURCO'S understanding that since the material was going to be used to construct a driveway, "screening"*** and not crushed stone was being donated (T-443, 465, 466). TURCO'S supervisor GREENE likewise believed that "screening" and not stone was being requested (T-482, 501, 504). It was not until the following day that TURCO realized that stone had been taken instead of screening (T-467). Once TURCO learned of this, he called GREENE who in turn called TONY ALECCA. He asked ALECCA what he was doing. ALECCA told GREENE of the need for additional material based upon a miscalculation. Permission was given to take a few more loads but, to GREENE, the venture was "embarrassing". "Because what was a good will gesture is now taken advantage of everybody". (T-486)

*DALEY denied asking for stone. He asked ALECCA for waste material (T-1377, 1493, 1496).

**At that time, Hudson Cement had two labor contracts with Local 445 (T-79).

***Screening is a dust-like material (T-483). Its value varies. At the time of the trial, Hudson Cement was backlogged with a quarter of a million tons of it. It was then a waste product (T-498).

Thereafter, ALECCA told TOM CLAUSI, a Local 445 shop steward employed by the Callanan Road Improvement Company (T-81), and a man with a poor reputation for truth and veracity (T-742), that he had to make arrangements to obtain trucks and drivers to deliver the stone to Windham (T-84).

ALECCA told CLAUSI, then shop steward for Callanan Road Improvement Company, to contact MIKE SPADA and BOB KOZLOWSKI* to have their trucks down at the Hudson Cement Company to get them loaded with number one stone (T-199). Once the stone was loaded**, ALECCA would meet with CLAUSI and SPADA at SPADA's garage and indicate where it was to be delivered (T-201). The drivers consisted of FRED PERRY, FRANK QUALTERE, MIKE SPADA JR., BOB SNYDER and others. There were some ten or eleven drivers in all (T-203). DALEY was told by ALECCA that the stone would be delivered that evening (T-85).

*During the summer of 1971, KOZLOWSKI, a member of Local 445 as well as a truck owner, had a job supplying trucks on the Callanan Thruway job (T-688). On the Friday prior to Labor Day, he received a telephone call from CLAUSI who told him to bring some trucks and drivers to the Hudson Cement Company (T-691). KOZLOWSKI then asked a number of drivers, his brother RON, FORTE, BRENNAN and STEWART and BOCKELMANN whether they would drive. BRENNAN and STEWART both refused. He then drove to Hudson Cement and loaded the trucks (T-692).

KOZLOWSKI was finished loading in about a half hour (T-695). The caravan of trucks then left Kingston for Windham; the trip was interrupted for a stop for dinner (T-696). As KOZLOWSKI was driving up Route 296, he saw DALEY driving down the mountain in the other direction (T-698). He asked if KOZLOWSKI's truck was going to DALEY's camp. DALEY was told it was (T-699).

Most of the stone was dumped directly on the property, except for a tractor-trailer which dumped its load in the middle of the road; its contents were ultimately pushed in with a bulldozer (T-701).

After the stone was dropped, the truckers headed for home, stopping to eat and drink beer (T-702). They finally arrived at home at 2:30 a.m. (T-703).

**CLAUSI went to Hudson Cement where he met TOM TURCO. He told TURCO that ALECCA sent him down for number one stone. TURCO told CLAUSI to have the trucks weigh in and to on the 3/8 stone pile (T-207-208).

The trucks were loaded and CLAUSI went to SPADA'S garage. Because Mr. ALECCA had been involved in an automobile accident (T-86), his wife drove down and told CLAUSI that the material was to go to TED DALEY'S house in Windham (T-200).

After the trucks were loaded, MIKE SPADA JR., FRED PERRY, FRANK QUALTERE*, BOB SNYDER, ROBERT KOZLOWSKI, RONALD KOZLOWSKI, JOE FORTE**, DICK BOCKELMANN***, and HERB SUTTON made the Friday evening trip from Kingston to Windham (T-210, 211).

CLAUSI and VINNIE LA ROCCA travelled ahead of the truck caravan in CLAUSI'S pickup truck (T-212). On the way up to Windham, CLAUSI met TED DALEY who was travelling down North Settlement Road (T-213).

*CLAUSI contacted QUALTERE somewhere on a highway. QUALTERE was told he had to bring some waste material up to DALEY'S Windham camp (T-567, 568, 569, 589). He then picked up a SPADA truck, went to Hudson Cement, picked up a load of waste and followed the other trucks to Windham (T-568).

The following morning, he spoke with CLAUSI who told him of the need to drive up another load. He did this.

**JOE FORTE was asked to make the drive to Windham by BOB KOZLOWSKI (T-401). He participated in the loading at Hudson Cement Company and the drive to Windham. FORTE also participated in the following day's trip (T-410).

***BOCKELMANN was contacted following his evening meal (T-337). He picked up a load of stone at Hudson Cement Company and was told he was driving it to Windham (T-341). He drove to Windham arriving at 10:00 p.m. (T-368), dumped his load in the cut behind DALEY'S cabin (T-346) and drove home (T-348). In addition to driving the truckload of material to DALEY'S camp, BOCKELMANN also supplied a truck which was driven by JOE FORTE (T-356). This second vehicle was used to make an additional delivery of material the following day. BOCKELMANN was not paid for his services (T-356-358).

CLAUSI told DALEY that trucks with stone were on the way up to Windham and wanted to know where it should be dumped (T-214). DALEY told LA ROCCA to begin dumping at the back end of DALEY'S cabin (T-214). The loads of stone were ultimately dumped that evening and the drivers returned home to Kingston by about 2:30 a.m. Saturday (T-221). CLAUSI claimed he had not arrived at his own home until 4:30 a.m. (T-221).

On one occasion, MICHAEL EVANS drove a bulldozer up to Windham at the request of his superior, Mr. QUIGLEY (T-643). Because of the steepness of the grade, EVANS was unable to deliver the bulldozer - instead, he parked it on the side of the road at the foot of the mountain (T-644). The following day, EVANS went back up to Windham with a wrecker and delivered the machinery (T-645).

Several hours later, TED DALEY called CLAUSI and told him of the need for additional stone deliveries (T-222). DALEY told CLAUSI he needed 20 or 30 more loads (T-223). CLAUSI then called TURCO at Hudson Cement and arranged for additional pickups (T-223). He then called BOB KOZLOWSKI* and MIKE SPADA and asked them to come down to Hudson Cement and load their trucks for an additional trip to Windham (T-223-224).

*The following morning, at 7:00 a.m., CLAUSI called him and requested trucks and drivers (T-703). KOZLOWSKI called BOCKELMANN, FORTE and STEWART and they agreed to go (T-703). Ultimately, at 1:30 p.m., he went to Hudson Cement, loaded his truck with 3/8 stone (T-705), and drove up to Windham, arriving some two hours later (T-706). KOZLOWSKI never asked DALEY to compensate him for either his labor or for the cost of operating his trucks (T-756, 757).

Neither man voiced objection and at 1:00 p.m., some fifteen or sixteen trucks began pulling in at Hudson Cement and were loaded up with dirty 3/8 stone (T-224-228). Among the drivers on this second trip were TONY ZMIARCH, FRANK QUALTERE, BOB SNYDER, HERB SUTTON, HARLEY WILLIAMS, FRANK MAHONE, BOB KOZLOWSKI, RONALD KOZLOWSKI, DICK BOCKELMANN, JOE FORTE, COLLINS BECKER and ALTON STEWART (T-225). Two teamsters refused to make the drive to Windham - LELAND EATON and WILLIAM BRENNAN (T-225, 278-279). The fact of the refusal of these two men to volunteer their services was not reported to anyone (T-226, 280).

ANTHONY NACCARATO, a member of Local 445, was employed as a shop steward by the Lizza Construction Company on Route 84 near Newburgh in September 1971 (T-510-511). On the Friday evening prior to Labor Day 1971, he received a telephone call from CHET DAVIS. As a result of his telephone conversation, NACCARATO picked up a "low bed" truck from MIKE MAHONE, drove to Poughkeepsie and took it to Kingston (T-513). ALECCA led him to the DALEY camp with the bulldozer (T-515-516).

One afternoon, two weeks thereafter, NACCARATO received a telephone call from RAY EBERT*, indicating that the bulldozer was no longer needed and that NACCARATO could return it to DAVE ALEXANDER'S garage (T-520). He then picked up the bulldozer and returned it (T-521). He was not paid for his labor (T-522).

*EBERT is a business agent for Local 445 (T-520).

ALTON STEWART was employed by Callanan Road Improvement Company and was a member of Local 445 in September 1971. BOB KOZLOWSKI contacted STEWART personally and asked him if he would drive a load of material up to Windham (T-535). STEWART refused to make the drive that Friday evening (T-536). That evening, he received a telephone call from TOM CLAUSI, asking STEWART to drive a load up to Windham because "...if I wanted a job, I had better go. So I told him I would take a trip up the next day" (T-537).

On Saturday morning, STEWART received two telephone calls. One from BOB KOZLOWSKI and one from TOM CLAUSI, indicating that the drive was being pushed back until noon (T-537). He then picked up a KOZLOWSKI* truck, loaded the truck up at Hudson Cement Company and drove to Windham (T-538). After he dumped his load of stone, he returned home (T-540).

The round trip took five to six hours to complete (T-541).

DALEY was at the Windham house when the trucks arrived on Saturday afternoon (T-540, 708). He was working a bulldozer, grading off a knoll as the trucks pulled in (T-226). The stone was dumped in several small piles; HARLEY WILLIAMS used a bulldozer to spread the rest of it (T-227). The men were offered beer and water as refreshments (T-228).

At the quarterly union meeting, CLAUSI and ALECCA told DALEY they were sending up more trucks (T-1421). CLAUSI and DALEY agreed that an additional seven or eight loads of stone were needed to complete the Windham driveway (T-229). DALEY did not ask them where this material was coming from (T-1422).

*STEWART did not pay for the gas needed for the drive to Windham. KOZLOWSKI paid for it (T-542).

The following Friday evening, September 10th, a number of trucks, including those of MIKE SPADA and BOB KOZLOWSKI, drove to Hudson Cement Company where they loaded with "dirty" 3/8 stone (T-230). The following day, the stone was trucked to Windham (T-231, 711). CLAUSI accompanied BOB KOZLOWSKI on the trip. DALEY was not present when this Saturday delivery was made (T-1422).

In all, between 30 and 36 truckloads of material were driven to Windham* (T-239).

Later in September 1971, CLAUSI and DALEY had a conversation** outside the international teamster office in Washington, D.C. in which DALEY asked CLAUSI to get him some timbers*** (T-241). CLAUSI then spoke to KOZLOWSKI (T-716) and ultimately to EDDIE HAHN down at Maggiola in Pearl River. Ultimately in October 1971, the timbers were obtained from Maggiola (T-716) and a KOZLOWSKI truck from and with the approval of Callanan**** Road Improvement Company. These timbers were used on the State thruway to divert traffic (T-273). KOZLOWSKI dropped them off on a day when DALEY was physically present at his camp (T-721).

*There were four or five SPADA trucks and three KOZLOWSKI trucks (T-710). KOZLOWSKI paid for the gasoline for all his trucks (T-712).

**Following this conversation, CLAUSI claimed ALECCA called him several times indicating that DALEY was on ALECCA's back about the timbers (T-243).

***DALEY insisted he spoke of the need for railroad timbers (T-1370). When they were delivered, DALEY had no use for them. He complained to CLAUSI and ALECCA about this. ALECCA asked DALEY to keep them because he could use them (T-1372-1374). Subsequently, DALEY purchased the lumber he required at Windham Greenhouse Nursery and at the Poughkeepsie junkyard (T-1375).

****Work was slow and a truck was available (T-244).

In late October or November, CLAUSI was told by ALECCA that:

"Ted [Daley] is hot, He wants the timber." (T-246)

As a result of this, CLAUSI spoke with JOHN CALLANAN, the superintendent of Callanan Road Improvement Company. As a result of this, CALLANAN called DOC MARCELLE, who then spoke to ALECCA. Ultimately, the timbers were loaded on a truck driven by HARLEY WILLIAMS (T-248, 249).

On another occasion, a back hoe was lent to DALEY, but was not returned. On a Monday morning, CLAUSI drove up to Windham with a lo-boy to retrieve it (T-250-251).

ALECCA indicated that to his knowledge, Hudson Cement was not paid for the stone it donated (T-89), nor was payment made for the timbers, nor were the trucking companies or the drivers paid for their services (T-90).

In April 1973, ALECCA went to the Kingston office of the F.B.I. with ANTHONY NACCARATO, where he was interviewed (T-92, 102, 523). This trip was made subsequent to an unsuccessful attempt by the rival faction to defeat the "DALEY" slate in the tri-annual Local 445 election (T-104-105).

In March 1974, DALEY and BOB KOZLOWSKI had a conversation at the union hall in Newburgh in which DALEY told him that he could put KOZLOWSKI's four trucks to work "tomorrow", but wouldn't (T-832).

THE QUESTION OF FEAR

It was CLAUSI'S testimony that some of the men who were asked to deliver the stone to Windham were unhappy about the invitation.

"Well, some of them were unhappy. I says, 'Look, I am just as unhappy as you are, but if you have any gripes, don't pick it out on me. Call Mr. Alecca, call Mr. Daley'." (T-239).

CLAUSI opined that the drivers were afraid that CLAUSI would transmit their unhappiness up to ALECCA or DALEY. CLAUSI denied that he would ever have done that (T-238). When asked why he was a participant in the drives to Windham, CLAUSI alluded to his family responsibilities and stated:

"[F]rom the feeling I got around the union hall, you either did what you were told or you didn't work." (T-239).

On cross-examination, CLAUSI stated:

"Ted Daley or Tony Alecca never put pressure on me. They never threatened me." (T-296)

DICK BOCKELMANN indicated that he participated in the drives to Windham to "insure" his job. He was concerned that if he did not:

"[m]aybe there would be no more work for me some place." (T-364).

He concluded that DALEY did not ask him to make the drive up to Windham (T-376). He likewise conceded that DALEY had never refused BOCKELMANN a job (T-277).

BOCKELMANN conceded that he was not totally dependent upon Local 445 for employment (T-381). Indeed, at one point, he re-located to the jurisdiction of Local 294 and began work for a non-union employer (T-382).

JOE FORTE, who made three trips to Windham, claimed CLAUSI told him if he did not drive, "[D]on't bother coming to work on Monday", or words to that effect. He believed his job would be in jeopardy for non-participation (T-412, 417). He was not threatened during the period between the second and third Windham drives (T-418). During his testimony before the 1973 Grand Jury, FORTE indicated that the talk of job loss was only a rumor and indicated that his reasons for driving were not threats (T-422).

To the best of CLAUSI'S knowledge, none of the drivers were paid for their driving (T-239). CLAUSI was not paid, but then again, he did not expect to be paid (T-240, 264). Neither SPADA nor KOZLOWSKI were paid* for performing any hauling (T-240).

When the timbers were driven to Windham, the drivers were compensated because they were working on company time (T-249-250).

TOM TURCO of Hudson Cement indicated that he agreed to provide the material because he felt that if he didn't, they would continue to aggravate him and make pests of themselves (T-450-451). He was also concerned that nit-picking grievances would be raised at his plant (T-452).

At no time did DALEY communicate the idea either that those who drove material filled trucks to Windham would help themselves or that if they refused to drive they would be hurt by losing their jobs (T-310-312, 602). Nonetheless, CLAUSI felt that if he or

*The hourly teamster wage was \$6.90 per hour (T-240). The standard truck rental charge was \$15.00 per hour (T-240).

the other teamsters refused to drive that they would not have obtained employment on jobs controlled by Local 445 (T-313-314). CLAUSI denied threatening ALTON STEWART that he had better haul stone or he would not be able to work (T-315). At no time did DALEY pressure TOM TURCO of Hudson Cement to donate material for the driveway (T-461). Indeed, TURCO indicated that although 1971 was the contract year with Local 445, he did not consider that if he refused to donate material for DALEY'S driveway, such refusal would have any effect upon the contract negotiations (T-471).

BOB GREENE, TURCO'S supervisor was motivated to donate material for the driveway because:

"[I] could visualize that there could be problems, minor problems, which would result in loss of time or inspection of equipment that could be requested, which all affect the operating efficiency of the plant." (T-488).

He was concerned with possible union insistence upon application of all technical safety rules. Once the initial loads were taken on Friday evening, GREENE just "wanted to get the situation finished with as soon as possible" (T-489).

At no time was Hudson Cement paid for the stone delivered to Windham (T-490). When the owner of Hudson Cement learned of the donation, he "chewed" GREENE out for doing it (T-492).

TONY MCCARATO indicated that he participated in the drives to Windham for a multitude of reasons:

"More or less for friendship and to keep the ball and everything going smooth...The man was taking care of me. I was working steady. So I figured it wasn't going too far to go out of my way to do someone else a favor." (T-527)

Even when pressed by the prosecutor to speculate as to what he believed would happen if he failed to drive to Windham, NACCARATO replied:

"It was a toss up. I might not get a steady job later." (T-527)

ALTON STEWART, who refused to participate in the Friday evening drive to Windham, but who did drive on Saturday after hearing from CLAUSI, claimed he participated because he feared that if he didn't:

"There would have been a possibility that I may not have gained employment through the Union." (T-544)

While work assignments were made by the business agents, first ALECCA and later after ALECCA'S heart ailment, MIKE MARCO, a teamster, could obtain employment on his own (T-553).

FRANK QUALTERE, who drove waste material up to Windham on the Friday evening and Saturday prior to Labor Day, indicated that he participated in the drive because CLAUSI told him "... you are working so you go or else you don't work." He was afraid that if he did not go he would not have continued working (T-575, 603).

LELAND EATON was employed on a Callanan job* on the Thru-way in September 1971 when TOM CLAUSI contacted him. Although he was also asked to deliver a load of stone to DALEY'S camp, he refused to go. He told CLAUSI, "I will work whether I do it or not" (T-657). It was EATON'S belief that his failure to drive to Windham would not have economic repercussions**. "I felt an immune position...because I am a truck mechanic" (T-658).

*EATON, however, was driving a SPADA truck and also did repairs on SPADA'S trucks (T-657).

**He did, however, drive truck down and saw to it that it was loaded (T-658). EATON was not deprived of any work as a result of this posture (T-1287). - 16 -

MIKE SPADA told EATON that EATON did not have to participate if he didn't want to (T-1194, 1286).

CLAUSI never told EATON that he would relate the latter's refusal to drive back to DALEY (T-665). At no point after the delivery trips to Windham were made was EATON denied an employment opportunity because of his refusal to participate (T-669).

WILLIAM BRENNAN, who was also working on the Callanan State Thruway job in early September 1971, when BOB KOZLOWSKI contacted him and asked him to haul an extra load of stone (T-673). BRENNAN refused to go; he had made plans to camp out that weekend and had no intention of changing his plans (T-674, 683). The following Thursday, CLAUSI told BRENNAN to haul material up to DALEY'S camp. BRENNAN refused (T-674). CLAUSI warned BRENNAN that if he wanted to work the following Monday, he had better make the haul. BRENNAN retorted:

"If I am not working Monday, there are places to go to find out why I am not working." (T-675)

The fact is that BRENNAN did work the following week, but instead of working by the hour, he was switched over and worked by the ton. This changeover did not have any adverse effect economically on BRENNAN (T-676). KOZLOWSKI did not report BRENNAN'S refusal to drive to CLAUSI (T-747), or anyone else from the Union (T-748).

BOB KOZLOWSKI, who provided trucks on numerous occasions, testified that at no time did CLAUSI or DALEY threaten him into hauling material to DALEY'S camp in Windham (T-833). He claimed, however, that he supplied trucks "... for my drivers' sake. I didn't want to see them have any hard feelings with the union over it." (T-833)

HERB SUTTON was driving a SPADA truck on the Callanan Thruway job in September 1971 when CLAUSI told him that there was a need to make a "trip to the mountains" with a load of stone. When SUTTON protested that he had just completed an eight hour shift, CLAUSI told him:

"You will either go to the mountains or be looking for a new job." (T-781, 789)

SUTTON made the trip because:

"I was afraid if I didn't go, I would lose my work. I needed the job." (T-784)

This discussion followed a talk with MIKE SPADA wherein he was told:

"[T]o go along with it and save myself a lot of grief and headaches and trouble."* (T-789)

This was the only time that SUTTON was asked to drive material to Windham (T-790). Nonetheless, the following week, SUTTON remarked to a number of drivers that he would not transport another load of material even if it cost him his job (T-791). SUTTON was not terminated from his job at Callanan as a result of these utterances. Rather, he worked up through November 27, 1971 on that job (T-801).

SUTTON conceded that DALEY had never asked him to do anything for DALEY (T-790).

*SPADA denied ever telling SUTTON to drive to Windham or he would not be working (T-1196).

MIKE SPADA, the owner of a trucking business in Kingston, New York (T-1185), indicated that when TOM CLAUSI asked him if he minded sending a couple of trucks loaded with material up to DALEY'S camp, he indicated he had no objection (T-1192). SPADA was not threatened or coerced into supplying trucks for the Windham trip (T-1192-1193).

MATTHEW FITZGERALD, the Vice President of Callanan Road Improvement Company, which had a thruway construction project in September 1971, indicated that when he released a quantity of wooden beams for DALEY'S use, it was not out of fear that a failure to do so would result in union troubles (T-1294).

Even after DALEY learned of the existence of a Federal investigation into his union activities and that teamsters were talking with the F.B.I., he never fired them or attempted to deprive them of work (T-1428). When, in particular, EDWARD HAHN told DALEY he had to go before a Grand Jury and asked DALEY'S advice concerning what to say, DALEY told him to tell the truth (T-1429).

LOCAL CUSTOMS

It was not uncommon for union members to perform work on each other's property. Thus, a ravine behind ALECCA'S house was filled in with gravel which was delivered by NACCARATO in trucks supplied by BOB KOZLOWSKI, MIKE SPADA and DICK BOCKELMANN (98, 263, 361-362). The men were not paid for their work, but did receive a home cooked meal (98, 362).

In addition, union members VINNIE LA ROCCA, RICHARD WALKER and others came to ALECCA'S house and helped install a concrete basement which had been delivered by Colonial Sand and Stone (T-110).

On another occasion, HARLEY WILLIAMS brought a bulldozer and loader to ALECCA'S property (T-157). Later, still, WILLIAMS delivered blue stone to the back of ALECCA'S property to build a drainage field (T-158). MIKE SPADA'S trucks were used for this purpose (T-158).

Furthermore, on one occasion, ALECCA was given a pickup truck as a Christmas present which was paid for by members of Local 445 (T-155, 156).

On other occasions, FRED PERRY and BOB KOZLOWSKI* brought ALECCA "run-a-back" gravel and LELAND EATON dumped fill in ALECCA'S backyard while using a MIKE SPADA truck (T-161, 267). On numerous occasions, ALTON STEWART also delivered loads of material to ALECCA (T-542-543). He did this using BOB KOZLOWSKI'S truck (T-549). Similar trips were made by QUALTERE (T-572).

*KOZLOWSKI personally made three deliveries of material to ALECCA'S house as well as loaned trucks for such purpose (T-750). A total of a dozen of KOZLOWSKI'S trucks were loaned in all (T-751).

He did not pay for this (T-162). On one occasion, ALECCA obtained material for use in his own driveway from Hudson Cement (T-472). On other occasions, NACCARATO allowed ALECCA to take fill from his property (T-524-525). Other times, NACCARATO allowed relatives and friends to utilize his truck and bulldozer without charge (T-525-526).

There came a time when ALECCA purchased the adjoining property near his home and received the assistance of employees and equipment from contractors (T-162-163).

On another occasion, DICK BOCKELMANN obtained top soil from JOE SHWOLANG of Colonial Sand and Stone for use at the town Little League Field and for the local church (T-363).

The donation of material by TURCO and GREENE for use in DALEY'S driveway was not an unusual gesture. They frequently made donations as a "community relations" gesture (T-487).

On one or two occasions, Hudson Cement gave ALECCA material following his complaints concerning the rendering of damage to his property caused by blasting operations conducted on behalf of Hudson Cement (T-495). Another time, screening was donated for use in the construction of the parking lot at the union hall* (T-496). At no time did DALEY ever ask GREENE for any material (T-497).

*KOZLOWSKI provided his trucks on that occasion (T-752). In addition, KOZLOWSKI allowed his drivers to use his trucks. He also donated his trucks for use by community organizations (T-756).

It was also not uncommon for truckers to take, at no cost, the beams which road construction companies used as barriers and traffic dividers. SPADA used the beams, with the consent of Callanan Road Improvement Company, for blocks under his trucks when repairs were necessary (T-1197). No threats were ever involved in obtaining such beams (T-1198).

DALEY also did work for union members. On one occasion, DALEY and his son helped ALECCA scrape and paint his porch and the front of his house (T-1364). On another occasion, he worked on an inoperable cistern (T-1364).

In addition, DALEY did work for ALECCA'S neighbors, as well as on the homes and/or property of CHET DAVIS, RAY EBERT, BRAD WILSON and BILL McCONNELL (T-1368). Similarly, ALECCA helped DALEY move earth to establish the path for the circular driveway at the Windham camp (T-1482).

PURCHASES OF MATERIAL AND LABOR

DAVE ALEXANDER sold DALEY a quantity of "black-top" for the latter's driveway at his domicile in Wappinger Falls, New York (T-653-654, 1413). He also was loaned one of ALEXANDER's bulldozers for use at the Windham property (T-1542-1543).

When DALEY decided to increase the size of the Windham cabin, he retained a Windham contractor named TOMPKINS to do the work (T-1367). Similarly, when the pool was installed, the work was performed by ANTHONY SWIMMING POOLS and was paid for (T-1367). When a new roof was installed, the material was purchased at Windham Lumber Company in Pearl River and Newburgh (T-1368).

Because an improperly large type of beam was delivered by KOZLOWSKI, DALEY had no use for them. He ultimately purchased a usable size in Windham and Poughkeepsie (T-1375). When he wanted work done on his driveway, DALEY hired two contractors, Lawrence & Sons and Van Auken, to do the work (T-1376). In addition, bills for material purchased from Jack Landers Landscaping Center for railroad ties (T-1409), from Frank Tompkins for contracting services (T-1411), and Windham Lumber Company (T-1412) indicated DALEY's payment for materials obtained or services rendered.

Insofar as payment for the teamsters who drove from Kingston to Windham, DALEY insisted he had several conversations with ALECCA concerning his intention to compensate the men for their work (T-1424-1425). DALEY believed that payment of some \$700-\$800 would be fair to the truckers (T-1426, 1481, 1545). Accordingly, he gave this money, in cash form, to ALECCA at the union hall in

Newburgh (T-1426, 1469). This was confirmed by CHET DAVIS, who was present in the upstairs office in Newburgh when the money changed hands (T-970-971). Mr. DALEY neither sought nor obtained a receipt from his long-time friend and union president ALECCA (T-1426). He did not then feel a receipt was necessary (T-1426). He conceded, in the light of future developments, that it would have been better to have given ALECCA a check (T-1472).

DALEY did not check with the drivers to insure that the cash he gave to ALECCA had actually filtered down to them (T-1427). When an investigation began in 1973, DALEY wanted to speak to the drivers to ascertain whether they had actually been paid, but did not do so upon the advice of counsel (T-1428).

DALEY denied conspiring with anyone to extort materials for his Windham camp (T-1462). He also denied causing CIAUSI or ALECCA to extort any materials for the Windham cabin (T-1462).

Following the Government's rebuttal case, it rested (T-1821). The Court then denied defendant's Rule 29 motion made at the conclusion of the Government's direct case, stating:

"I am satisfied the Government has established the requisite showing as to interstate commerce under both Acts." (T-1823).

The Court then denied defendant's motion for a directed judgment of acquittal upon all of the evidence (T-1823).

THE PROSECUTOR'S SUMMATION

Although Assistant United States Attorney WOHL's summation for the most part conformed to the proper bounds and tone of closing arguments, a clear departure from these standards did occur, and to which proper objection was taken (T-2094).

In an attempt, we suppose, to demonstrate that DALEY's receipt of material for his Windham Camp driveway was not a voluntary gift on the part of the employer donor's, Mr. WOHL attempted to prejudice and inflame the jury against DALEY by referring to contentions outside the record, by arguing that as jurors they could not expect to get a donated driveway such as DALEY did. Specifically, Mr. WOHL argued:

"So, ladies and gentlemen, it is clear to you as you start to look at this case that Mr. DALEY received something of substantial value, that if you, ladies and gentlemen, had a house of that sort and decided that you needed a driveway and you went out to hire somebody to get that driveway put in, it would cost you a substantial amount of money in order to get that driveway put in.

"There is no doubt about that, and you, ladies and gentlemen, certainly don't get a driveway of this sort in the manner that Mr. DALEY did." (T-1857).

Such a line of argument, we contend, is improper, and denied DALEY a fair trial. This conclusion is particularly necessitated by the trial court's declination to charge the jury to disregard this episode of rhetorical excess.

THE COURT'S CHARGE

The Government's theory supporting the Hobbs Act count was that DALEY received his driveway materials as a result of the donor employer's fear that failure to keep a local union official contented might result in union repercussions for them. The defense denied that the materials were obtained by fear. A central issue in the case was the propriety of such a case being prosecuted in a federal forum rather than in a New York State criminal court.

A key and focal question for the jury to resolve was whether DALEY's conduct, if found to be wrongful, had a sufficient impact upon interstate commerce such as to fit within the parameters of 18 U.S.C. 1951.*

In this context the court's legal instructions became crucial. Judge LASKER charged the jury that a potential affect upon interstate commerce was sufficient to violate Sec. 1951. Defense counsel took exception to such an expansive reading of Sec. 1951.

As will be developed in Point II, the Court committed serious error and drastically alleviated the Government's burden of proof by so charging on the Government's burden of establishing a violation of Sec. 1951. In so doing the Court deprived DALEY of a fair trial.

*The defense did not dispute the jurisdictional propriety of the Landrum-Griffin counts.

STATUTES INVOLVED

Title 18, United States Code, Section 1951, states:

"§ 1951. Interference with commerce by
threats violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section --

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

Title 29, United States Code, Section 186(b)(1),

(d), states:

"(b)(1): It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

"(d): Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both."

Title 28, United States Code, Section 455 provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

Title 28, United States Code, Section 144 (1970) provides:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

QUESTIONS PRESENTED

1. Was the evidence legally sufficient to support a conviction for conspiracy to and violating the Hobbs Act?
2. Did the Court's charge incorrectly explain the purview of the Hobbs Act by indicating that conduct which had a mere potential affect upon inter-state commerce is sufficient to violate the Hobbs Act?
3. Did the Court err in finding that sufficient independent evidence existed such that the hearsay utterances of Daley's co-conspirators could be considered as evidence-in-chief against him and by failing to dismiss the conspiracy count?
4. Did the Court err in denying defendant's recusal motion?
5. Did the Government's summation deny defendant a fair trial?
6. Should the indictment have been dismissed because of the use of hearsay before the Grand Jury?

POINT I

THE TRIAL EVIDENCE WAS LEGALLY INSUFFICIENT TO ESTABLISH CONDUCT VIOLATIVE OF THE HOBBS ACT

The Government's resort to, and the petit jury's finding that Daley's receipt of material from employers and trucks and trucking services services from employees violated the Hobbs Act is legally untenable. If a conviction under these counts* is permitted to stand, conduct heretofore reserved to the States, and having an insufficient nexus to the exercise of Federal jurisdiction, will have been assumed by the Southern District United States Attorney's Office at a time and under circumstances when the jurisdiction of the Federal courts is contracting and not expanding the focal point of its work. See, Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976).

The trial evidence was legally insufficient to establish (1) that the acts alleged and proven at trial had any effect whatsoever on interstate commerce, (2) that the "victims" of the alleged extortion acted out of reasonable fear, and (3) that the acts alleged and proven at trial were in the nature of racketeering as required by the Hobbs Act.

*We raise no further legal challenge, in this forum, as to that portion of the verdict which found Daley guilty of violating 29 U.S.C. 186. Given the traditional play which the jury could exercise, its resolution against Daley is not contested herein.

A. The Trial Evidence was Legally
Insufficient to Establish any
Effect on Interstate Commerce as
Required by the Hobbs Act.

It is axiomatic that in order to constitute a violation under the Hobbs Act, an activity must have an effect upon interstate commerce. Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960). "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." Id. at 218, 80 S.Ct. at 274.

The de minimus rule with respect to interstate commerce (see, United States v. Shackelford, 494 F.2d 67 (9th Cir.), cert. denied, 417 U.S. 934, 94 S.Ct. 2647 (1974)), has prompted satisfaction of the interstate commerce requirement under the so-called "depletion of assets" theory. United States v. Mazzei, 521 F.2d 639 (3d Cir.) (en banc), cert. denied, ____ U.S. ____, 96 S.Ct. 446 (1975). The Third Circuit's position is that:

"where the resources of an interstate business are depleted or diminished 'in any manner' by extortionate payments, the consequent impairment of ability to conduct an interstate business is sufficient to bring the extortion within the play of the Hobbs Act." Id. at 642.

While recognizing the "depletion of assets" theory, the Second Circuit has narrowed the scope of its application. In United States v. Merolla, 523 F.2d 51 (2d Cir. 1975), the court stated:

EDITOR'S NOTE

Pages **33** were missing at time of filming. If, and
when obtained, a corrected fiche will be forwarded to you.

"Where the victim of an extortion scheme customarily obtains supplies through interstate commerce, the diminution of the victim's resources impairs his purchasing power and may therefore be found to affect interstate commerce for the purpose of the Hobbs Act....

"The victim's purchase of interstate goods, however, must be of a continuing nature, or the relationship between the extortion and any interstate commerce becomes merely conjectural." Id. at 54.

Merolla involved a contract to build a car showroom for defendant McNamara. Goberman, the general contractor and alleged victim of the extortion, engaged various subcontractors to supply materials and labor. With respect to the interstate commerce element, the evidence adduced at trial showed that (1) pursuant to a contract between Goberman (the victim) and Merkel Electric Co. for the installation of lighting apparatus, electrical supplies were delivered to the job site from out of state; (2) steel joists and steel roof decking were shipped interstate to the job site in satisfaction of orders which Goberman placed with Fiberproof Products, Inc.; (3) in fulfillment of an agreement between Goberman and Warren Brody for the installation of garage doors, doors were delivered to the job site from their place of manufacture in New Jersey; and (4) new automobiles which (defendant) McNamara sold at the completed showroom were assembled in other states and transported into New York. Id. at 54.

Despite these facts, the court in Merolla held that the Government had failed to establish the requisite interference

with interstate commerce and, accordingly, reversed the Hobbs Act conviction and remanded with instructions to dismiss the indictment.

Similarly, in the instant case, even when the trial evidence is construed in the light most favorable to the Government (see, Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, (1942)), it is patently clear that the conduct of defendant Daley and his alleged co-conspirators had an insufficient impact on interstate commerce to warrant displacement of an inherently local prosecution by federal law enforcement agencies.

In the present case, defendant Daley was convicted for allegedly extorting the use of manpower and trucks from union employees to transport materials which he allegedly extorted from union employers. The Government established at trial, in an attempt to satisfy the interstate commerce aspect of the Hobbs Act charges, the following: (1) that Local 445, the union which was headed by defendant Daley, had business dealings with the International Brotherhood of Teamsters which is located in Washington, D.C.; (2) that the trucks used to transport the materials and the gas used to run the trucks were purchased from companies involved in interstate commerce; (3) that the truck drivers who transported the materials happened to be engaged with the construction of an interstate highway; and (4) that Hudson Cement, who supplied the stone allegedly extorted,

shipped cement out of New York State, although it rarely shipped stone to other than New York City.

Any affect on interstate commerce by the just-mentioned factors is so farfetched and speculative as to be less than the conjectural affect established in Merolla. If a Hobbs Act conviction can be sustained on such a weak foundation with respect to the interstate commerce requirement, local prosecution of the crime of extortion can be subsumed at the whim of federal prosecutors.

The connection between the IBT and this case is so remote as to be non-existent. The alleged extortion occurred because of defendant Daley's position with Local 445. That Daley may have extorted materials and labor for a vacation home has absolutely no impact on dealings between the local and the IBT.

Virtually all motor vehicles and gasoline are produced in interstate commerce. Allowing a conviction under the Hobbs Act because the trucks used to transport the stone and timbers and the gas used to run the trucks were purchased from interstate concerns would turn any extortion into a federal case if a motor vehicle becomes involved. Such a result is absurd.

The fact that the drivers who transported the stone to Mr. Daley's upstate property happened to be engaged in the construction of an interstate highway also has a less than remote connection with interstate commerce. The transportation of

stone took place after hours and on weekends. What the drivers do on their free time is their own personal business. That they may have been victims of extortion during this free time should not be elevated to a Hobbs Act violation simply because their jobs entailed interstate activities.

Finally, although Hudson Cement shipped some cement out of state, Mr. Greene, Hudson's general manager, testified that they shipped "practically all" of their stone to New York City. Under Merolla, supra, the relationship between the alleged extortion and interstate commerce because of these small, irregular shipments becomes merely conjectural.

Due to the conjectural nature of the affect which the alleged extortion had on interstate commerce, it is incumbent that the convictions under Counts I and II involving the Hobbs Act be reversed and the indictments dismissed.

Alternatively, if any one of the allegedly extortionate activities -- namely, the extortion of the trucks, the truck drivers, the gas, the stone and the timbers -- is found to have had no affect on interstate commerce, the Hobbs Act convictions should be reversed. This result is mandated because the Government submitted these separate extortions under one conspiracy count and one substantive count. It is possible that the jury found extortion with respect to one activity, e.g., the stone, but not with respect to all the activities.

Therefore, if the interstate commerce aspect is insufficient to support a conviction of any one of the alleged extortions, it is respectfully submitted that Counts I and II of the conviction should be reversed.

B. The Trial Evidence was Legally Insufficient to Establish Reasonable Fear as Required by the Hobbs Act.

As indicated by this court in United States v. Rastelli, 551 F.2d 902 (2d Cir. 1977), a conviction under the Hobbs Act for extortion by fear must be founded on "reasonable fear in the mind of the 'victim'".

However, when the trial evidence is considered in the light most favorable to the Government, it is still obvious that it was neither fear created or knowingly and intentionally capitalized upon by defendant Daley which motivated the drivers and employers to volunteer goods and services for the Windham camp.

Paramount in this respect is the proven fact that Daley never made any threats to any of the drivers or employers. Nor was there evidence that he had ever threatened others in any prior or subsequent incidents. Moreover, it is significant that more than one driver refused to participate when asked by Alecca and Clausi. Nevertheless, no retribution was forth-

coming against those who did not take part. There was also evidence of a cash payment of \$100 to \$800 by Daley to Alecca for distribution to the drivers for their services. Finally, in light of the local custom of union members in aiding one another on home improvement projects and the custom of Hudson Cement in donating materials as a community relations gesture -- e.g., they donated material for a driveway at the union hall -- it is clear that the reasonable fear envisioned by the Hobbs Act was not present in this case.

Accordingly, the guilty verdicts on the Hobbs Act counts should be set aside.

C. The Trial Evidence was Legally
Insufficient to Establish Racketeering
as Required by the Hobbs Act.

While the United States Constitution is a dynamic document, growing to meets the needs of each successive generation and subject to applications not envisioned by the Founding Fathers, statutes enacted by Congress are not as flexible. Rather, they are static and must be applied only as intended by the framers of each specific piece of legislation.

The Hobbs Act was enacted "...simply to prevent both union members and non-union people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce..." (see remarks of Congressman Hancock in 91 Cong. §11900 cited with approval by the Supreme Court in United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 1011 (1973)). However, as often happens when Congress passes criminal legislation to eradicate a specific societal evil, Congress utilized very broad language to facilitate the effective application of the statute in an attempt to cover all of the possible ills which it intended to correct. Unfortunately, this overbroad language of the Hobbs Act has been seized upon by over-zealous federal prosecutors to bring essentially state violations within the jurisdiction of the federal courts -- a result which was unintended by the Congress which enacted the Hobbs Anti-Racketeering Act.

Recently, however, several courts have re-examined the limited scope of the Hobbs Act. The Supreme Court in United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007 (1973), found that the Hobbs Act does not reach violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands. After examining the legislative history of the Act, the Court reasoned that:

" would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in the federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." 400 U.S. at 411, 93 S.Ct. at 1015.

Relying on Enmons and further examining legislative history, both the Sixth and Ninth Circuits have very recently held that conduct, to be violative of the Hobbs Act, must come under the rubric of "racketeering". Therefore, activities which fall within the literal language of the statute will not be held to violate the law unless the activities constitute a form of racketeering.

Thus the Sixth Circuit, in United States v. Yokley, 542 F.2d 300 (6th Cir. 1976), held that the mere armed robbery of a discount store failed to charge "racketeering" under the Hobbs Act, but rather charged activity within the exclusive

criminal jurisdiction of the State of Michigan. The court postulated that if the Hobbs Act encompassed the mere robbery of a business engaged in interstate commerce:

"the robbery of a corner grocery store, pharmacy or gasoline service station, without more, would be a federal offense. The offense of armed robbery, traditionally a matter of concern under state criminal laws, would become a matter within the responsibilities of the United States Attorneys and the federal courts. The legislative history of the Hobbs Act and its predecessor statute demonstrate to our satisfaction that no such sweeping result was intended by Congress." 542 F.2d at 304.

Therefore, the court concluded:

"although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act." Id.

Similarly, the Ninth Circuit, in United States v. Culbert, 548 F.2d 1355 (9th Cir. 1977), has

"adopt[ed] the reasoning of the Sixth Circuit's eminently sensible opinion.... [A] contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the state. Consideration of federalism, apart from the legislative history also emphasized in Yokley, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty." 548 F.2d at 1357.

Thus the attempted extortion by defendant of \$100,000 in bank assets by means of telephoned threats of physical violence were held to be unrelated, in any way, to "racketeering" and, therefore, not within the scope of the Hobbs Act.

Indeed, Chapter 95 of Title 18 of the United States Code, which encompasses, inter alia, the Hobbs Act and the Travel Act, is entitled "Racketeering".

The acts purportedly proven in the present case -- namely, the receipt of materials and labor for a vacation home from union employers and employees who customarily helped one another out -- are clearly not "racketeering" within the scope of the Hobbs Act. Testimony was given at the trial by various union members that on numerous occasions they had given or received assistance with respect to home improvement projects and by Mr. Greene, the general manager of Hudson Cement, that they frequently made donations as a "community relations" gesture.

To paraphrase the words of the Sixth Circuit, to interpret §1951 to apply to the instant alleged activities, "as urged by the Government, would encompass literally any [extortion] occurring in any state", United States v. Yokley, supra, at 304. "No such sweeping result" could have been intended by Congress. Id. at 305. The alleged activities are, in fact, under the exclusive jurisdiction of the State of New York. See, N.Y. Penal Law §155.40 (McKinney 1975).

Moreover, the theme of federalism with respect to the Hobbs Act, which runs through the decisions in Enmons, Yokley and Culbert, has not been totally ignored by the Second Circuit. In United States v. Merolla, 523 F.2d 51 (2d Cir.

1975), for example, the Court of Appeals found the effect of defendant's acts upon interstate commerce insufficient to warrant converting another locally prosecutable offense into a federal Hobbs Act violation.

More recently, in United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), the Second Circuit affirmed that portion of an Eastern District judgment involving Hobbs Act violations but strongly questioned the advisability of stretching the Act to meet modes of conduct only marginally related to the theme of Congressman Hobbs' bill. See, United States v. Brecht, supra, at 52 n. 14. Judge Gurfein recognized that "the main purpose of Congress in enacting the Hobbs Act was to combat labor racketeering". Id. at 51. The activities which are normally prosecuted under the Hobbs Act are those which are "the familiar tools of organized crime". Id. at 52.

In no sense can the alleged activities in the instant case be classified under the heading of organized crime. A single incident involving the receipt of labor and supplies to be used in the construction of a driveway at a vacation home has no more connection with organized crime than does the robbery of a discount store. The coverage of the Hobbs Act should not be expanded to trespass upon traditionally state ground. The act alleged in the instant indictment constitutes, at best, a violation of the state's extortion statute. See, N.Y. Penal Law, §155.40 (McKinney 1975). To hold otherwise

would constitute judicial sanction of a federal "power grab"
in violation of the sovereignty of the State of New York.
Such a course should not be followed.

POINT II

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN HIS CHARGE WITH RESPECT TO THE INTERSTATE COMMERCE ELEMENT OF THE HOBBS ACT COUNTS

In his charge to the jury, Judge Lasker properly stated that "extortion need affect interstate commerce only in a minimal degree to constitute a violation of the Hobbs Act (see Trial Transcript at 2067). However, he added "it is sufficient if the extortion potentially affects commerce". Id. at 2067-68.

In light of this court's decision in United States v. Merolla, 523 F.2d 51 (2d Cir. 1975), it was error to charge that there need be only a potential affect on interstate commerce because otherwise "the relationship between the extortion and any interstate commerce becomes merely conjectural". Id. at 54. While the affect on commerce may be minimal, direct or indirect, there must be an actual affect on commerce, not merely a potential one.

Additionally, after charging the jury as to what type of affect on interstate commerce they must find in order to satisfy the Hobbs Act, Judge Lasker proceeded to charge:

"If you believe the Government's witnesses and evidence regarding interstate commerce that has been put before you beyond a reasonable doubt, then I charge you that as a matter of law there was an effect on interstate commerce and the necessary Federal jurisdictional element is satisfied."
Trial Transcript at 2068.

In this charge to the jury, Judge Lasker at the very least confused the jury* with regard to their role in deciding the issue of whether interstate commerce had been affected. Were they to decide merely whether they believed the Government witnesses or, assuming they did so believe, were they to determine whether the extortion had any affect, potential or otherwise, on interstate commerce?

Considering also that the facts with respect to interstate commerce were not disputed by the defense, Judge Lasker's charge takes on the character of a directed verdict.

It is respectfully submitted that it was not only improper to charge that commerce need only be potentially affected, but that the interstate commerce element would be satisfied if the Government's witnesses were believed. Therefore, the Hobbs Act counts should be reversed because of trial error.

*See, United States v. Barry, 518 F.2d 342 (2d Cir. 1975).

POINT III

THE GOVERNMENT'S FAILURE TO COMPETENTLY AND INDEPENDENTLY ESTABLISH A CONSPIRACY AS A CONDITION PRECEDENT TO ITS USE OF CONVERSATIONS OF ALECCA AND CLAUSI REQUIRES DISMISSAL OF COUNT I. THE CONSIDERATION OF THEIR TESTIMONY AS EVIDENCE IN CHIEF WAS EVIDENTIARY ERROR.

Theodore G. Daley stands convicted of Hobbs Act violations not because of what he said or did, but rather because of the words and deeds of Anthony Alecca and Thomas Clausi, men whom the Government has characterized as co-conspirators such that their statements, both amongst themselves and, most important, those utterances to the suppliers of materials and trucks and the truck drivers who were asked to drive to Daley's Windham camp, would be admissible against Daley. The defense posture throughout the case was an emphatic denial that Daley entered such a conspiracy to extort materials for use at the Windham camp or the use of trucks and drivers to haul that material up the mountain from Kingston.

Rather, the defense contended that the materials were brought to Windham because the drivers freely volunteered* their services, and the drivers of the denoted materials regarded them as essentially useless waste products.**

*Daley contended, without contradiction, that he gave Alecca \$700-800 in cash for transmittal to the drivers. This money apparently never made it past Alecca because the drivers did not receive any money (T-1426, 1481, 1545).

**Daley had asked for screening for use in building a driveway and damaged highway road dividers from a State thruway job.

Furthermore, if pressure was brought to bear, it was, the defense contended, the independent voluntary decision of Alecca and Clausi* to apply it, and not due to any agreement, understanding, or acquiescence of Daley.

In this context the question whether the Government independently established a criminal agreement to extort materials from teamster employers and driving services from teamster drivers was the paramount issue upon which the case turned.

The defense strenuously objected to the admission of the otherwise hearsay conversations of Alecca and Clausi, claiming there was insufficient evidence independent of the words and deeds of the alleged co-conspirators to establish that a criminal agreement existed (see, United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969)) sufficient to permit the testimony to be received under the co-conspirators exception to the hearsay rule. See, Federal Rules of Evidence, Sec. 801(d)(2); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210 (1970). Indeed, we contend that the trial record is barren of any evidence, independent of the declarations of Alecca and Clausi, from which evidence of a conspiracy might be found.

*In the time period in question, 1971, Alecca was President of Local 445 and a business agent. Clausi was a shop steward employed by the Callanan Road Improvement Company. Each had a separate image and identity from that of Daley to independently demand material with a sense of credibility and/or "throw Daley's name around" by attributing a potential for harm or retribution if cooperation was denied but which never existed.

We are mindful, as Judge Friendly has noted in United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977), that the Government bears a lesser burden in establishing the existence of a conspiracy for the evidentiary purpose of introducing evidence under the co-conspirators rule than it does ultimately in attempting to sustain a court's ruling submitting a conspiracy count to the jury. See, United States v. Stanchich, supra, p. 1299. Nonetheless, we contend that when this case is stripped of its essentials, there is no independent evidence linking Daley to Alecca and Clausi.

It is elementary, of course, that to constitute a conspiracy there must be an agreement or meeting of the minds, and unless the parties actually do agree to engage in particular conduct, there is no conspiracy. See, United States v. Falcone, 311 U.S. 205, 210 (1940); United States v. Rosenblatt, ___ F.2d ___ (2d Cir. 1977), slip opin. 3031, 3033. Thus, even if Alecca and Clausi believed Daley desired free materials and trucking services, but Daley himself, as the uncontradicted testimony shows, wanted waste material and volunteer drivers, then as a matter of law there could be no conspiracy because there was no agreement as to the essential nature of the plan. Where the alleged co-conspirators have different understandings and act with distinctive mens rea, a conspiracy, as herein, to violate the Hobbs Act may not be found. See, United States v. Rosenblatt, supra, p. 3035. Such was the case herein.

Thus Judge Lasker erred when he held that a proper basis was established sufficient to permit the jury to consider the hearsay statements as evidence in chief.

B. The Submission of the Conspiracy Count to the Jury.

Even assuming arguendo that this Court is persuaded that a proper basis existed sufficient to sanction Judge Lasker's ruling that the hearsay testimony of Alecca and Clausi could be considered by the jury, such approval does not foreclose review of the Court's denial of defense counsel's request not to submit the Hobbs Act conspiracy count to the jury. Indeed, United States v. Stanchich, supra, p. 1299, admonishes the trial bench that not only are two distinctive rulings involved, but emphasizes that an appreciably higher standard must be applied to a defendant's motion to prohibit submission of the conspiracy count to the jury.

In the latter case the standard is:

"[W]hether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind fairly conclude guilt beyond a reasonable doubt."

See, United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), United States v. Stanchich, supra, p. 1299.

In contending, as we do, that sufficient evidence establishing a conspiracy to violate the Hobbs Act was not produced, we are not asking this Court to substitute its judgment on questions of fact or matters of credibility. Rather, we contend, applying the Taylor standard, that there was simply insufficient evidence to warrant submission of the Count to the jury.

Accordingly Count I should be dismissed.

POINT IV

BECAUSE OF THE COURT'S STATUS AS THE TRIAL JUDGE IN A PRIOR PROCEEDING WHEREIN THE COURT PASSED UPON THE CREDIBILITY OF RAYMOND EBERT AND THEODORE G. DALEY AND FOUND AGAINST LOCAL 445, THE COURT SHOULD HAVE RECUSED ITSELF.

Because the Honorable Morris E. Lasker has previously been required to pass upon the credibility of key defense witness Raymond Ebert, and the defendant Theodore G. Daley, specifically, the general operations of Local 445 generally, it was necessary that the Court recuse itself from presiding further in the trial of this case. Under these circumstances, recusal was required as a matter of law and as an exercise of judicial discretion in order to assure the fair and impartial trial guaranteed to Mr. Daley by the Constitution (Amend. V, VI and XIV) and as required by the Code of Judicial Conduct. The Canons of Judicial Ethics strongly suggest that a judge who finds himself in this posture disqualify himself.

The first canon states that the Code's provisions are to be construed in accordance with the highest standards of judicial conduct. These standards further mandate that a judge "avoid impropriety and the appearance of impropriety in all his activities" and "perform the duties of his office impartially and diligently".

It is respectfully urged that the high standards for judicial performance as set forth by the Code were not met since his Honor presided at the trial of defendant Daley. In

light of the nature of the relationship between this Court and defendant Daley and the witness Ebert arising out of a prior civil litigation involving union activity scarcely a year prior to the occurrence of the acts charged in the indictment, coupled with Judge Lasker's fact-finding in conjunction thereto, the appearance of a lack of impartiality may be viewed by many.

By mandating a Judge's disqualification in such a situation, the Code lends support to the better-reasoned view that just as justice must be maintained by the judiciary, so must the appearance of justice and the absence of pre-judgment. Offutt v. United States, 348 U.S. 11 (1954); Berger v. United States, 225 U.S. 21, 34-35 (1921); Mitchell v. Sirica, 502 F.2d 375, 381-382 (MacKinnon, J., dissenting); Hoiry v. Lavine, 553 F.2d 845, 851 (2d Cir. 1977); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941); J. MacKenzie, The Appearance of Justice, 241 (1974).

In addition to the Fifth Amendment and the Sixth Amendment rights to a fair trial and the provisions of the Code of Judicial Conduct, federal statute provides for the disqualification of a judge for bias or prejudice or by reason of his interest in the parties or the proceedings. Title 28, U.S.C. Section 455 (1970) provides:

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has

been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal or other proceeding therein."

Title 28, U.S.C. Section 144 (1970), which provides for the disqualification for bias or prejudice of the judge, states in pertinent part:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." (Emphasis supplied.)

Although the courts have not been uniform in their interpretation of the above statutes, it is the better-reasoned approach to construe them with due regard for their underlying purpose, i.e., the protection of the accused's constitutional right to a fair trial before a neutral and detached judge. This purpose necessarily contemplates the maintenance of the appearance as well as the actual existence of impartiality on the part of the judge. Commonwealth Coal-
ings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968); In re Murchison, 349 U.S. 133 (1955); Offutt v. United States, supra; Tumey v. Ohio, 273 U.S. 510 (1927); Berger v. United States, supra; Mitchell v. Sirica, supra; Note, Dis-
qualification of Judges for Bias in the Federal Courts, 79 Harv.L.R. 1435 (1966); Note, Disqualification of a Federal District Judge for Bias - The Standard Under Section 144, 57

Minn.L.R. 749, 760-762 (1973).

In denying defendant's application for a mistrial and motion for recusal, the Court leaned heavily upon the fact that its status in the prior civil matter was a matter of public record and, hence, the grade school educated DALEY had waived any basis for recusal by not moving pre-trial on this basis. At the same time, the Court found as a fact that defense counsel was unaware of this prior proceeding.

We submit that where a defendant becomes aware* of the fact that his trial judge had a prior involvement with himself and his enterprise and the criminal trial focuses upon the defendant's conduct as a leader of the enterprise, it cannot be said that the lay defendant has waived his right to request recusal of the trial court.

In so contending, we do not mean to suggest that a recusal motion can never be waived. Thus, in Galella v. Onassis, 353 F.Supp. 196 (S.D.N.Y. 1972), aff'd in part, rev'd in part, 487 F.2d 986 (2d Cir.), Judge Cooper properly ruled that a recusal motion was untimely because the proffered grounds were informally raised by movant a month prior to trial and no motion was filed.

*The Government's awareness of the Court's status and its attempt to affirmatively utilize the Court's prior findings were the moving force prompting defense counsel's recusal motion.

Similarly in United States v. Civella, 416 F.Supp. 676, 680 (W.D.Mo. 1975), the trial court found, inter alia, that counsel had actual knowledge of the facts for a considerable period and yet did not file his motion. In the case at bar, of course, the Court found that defense counsel had no awareness of the facts until the crucial side bar conference.

Concededly, in Hirschkop v. Virginia State Bar Association, 406 F.Supp. 724 (E.D. Va. 1975), the Court held that a recusal motion was untimely made because the information underlying the motion was "known or knowable" at a much earlier time than when the motion was filed. It is important to note that petitioner was an attorney and the standard to which he personally would be held to is and should be higher than that of Daley, who had minimal formal education and to whom the Court's identity would not have struck a responsive chord.

Likewise, in John Hopkins University v. Hutton, 316 F. Supp. 698 (D. Md. 1970), the lack of timeliness contributed to denial of recusal but importantly because the motion was not filed until May 12, 1970 and was dependent, in part, on facts previously alleged in a prior affidavit filed on July 31, 1969 and related to facts known or knowable as early as February 3, 1967, when such a factual hiatus is contrasted to the promptness with which defense counsel moved in the case at bar, it is clear that its holding vis-a-vis timeliness is distinguishable.

Similarly the decision in Smuck v. Hobson, 408 F.2d 175, 183 (D.C. Cir. 1969), which upheld former District Judge, now Court of Appeals Judge J. Shelly Wright's decision not to recuse himself in a civil quality of education case where the recusal allegations were based upon prior published legal philosophy and claimed improper remarks by the Judge, from the bench, two weeks prior to the filing of the motion. Once again, the facts are clearly distinguishable from both the basis and dispatch with which defense counsel moved.

The true rule appears to be that the question of timeliness for a recusal motion raises a question of degree, and that timeliness must be asserted after actual knowledge of the allegations for disqualification are ascertained. See, Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567, 574-575 (4th Cir. 1975); United States v. Patrick, 542 F.2d 381, 390 (7th Cir. 1976).

It is clear that the cases relied upon by the Court as its basis for denying the recusal motion (T-1270-1271) are factually distinguishable, and neither mandated nor suggested the result adopted by the Court.

Under the facts of the case at bar, the interest of avoiding the appearance of bias and injustice clearly outweighed the small inconvenience that reassignment to another judge in a multi-judge district would have placed upon the expeditious administration of justice.

Accordingly, and in light of the Court's status as the Judge in a prior civil labor case involving the defendant in the case at bar and a vital defense witness, this Court erred in failing to disqualify himself from further presiding at the trial and in not declaring a mistrial. Certainly, at the very least, the Court was obligated to follow 28 U.S.C. 144 and await a determination by a brother District Judge on the merits of the recusal application. This failure to refer, as well as the ultimate determination of the recusal application, were errors requiring a vacatur of the judgment and a new trial.

POINT V

THE PROSECUTOR'S SUMMATION DENIED
DEFENDANT A FAIR TRIAL

It is a well understood precept that closing arguments in a trial should be directed toward the four corners of the evidence in the record and the inferences which the respective parties believe should be drawn from the evidence. Of particular concern, in this connection, is the conduct of Government attorneys, for as the Supreme Court has held:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

See, Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935).

In this connection, this Court has held that it is patently improper for the Government prosecutor to interject the prestige of his office into the fact finding process by expressing his personal opinions concerning contested facts at the trial (see, United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); United States v. White, 486 F.2d 204, 204 (2d Cir. 1973); Code of Professional Responsibility, EC 7-24), or to comment upon a defendant's reliance upon his constitutional right not to introduce affirmative evidence to negate a portion of the Government's proof, and not to have this failure commented upon (see, Griffin v. California, 380 U.S. 609; United States v. Burse, 531 F.2d 1151, 1154 (2d Cir. 1976)), or to make comments solely to emotionally inflame the jury against the defendants (see, Berger v. United States, supra; People v. Ashwall, 39 N.Y.2d 105, 383 N.Y.S.2d 204 (1976)). Measured against these standards, we contend that Assistant United States Attorney Wohl's summation was patently improper and denied defendant Daley a fair trial.

Specifically, we contend that Mr. Wohl's argument placed the jury into assessing Daley's conduct from the standpoint of what they would have done under similar circumstances which was error.

"So, ladies and gentlemen, it is clear to you as you start to look at this case that Mr. Daley certainly received something of substantial value, that if you ladies and gentlemen had a house of that sort and decided

that you needed a driveway and you went out to hire somebody to get that driveway put in, it would cost you a substantial amount of money in order to get that driveway put in.

"There is no doubt about that, and you, ladies and gentlemen, certainly don't get a driveway of this sort in the manner that Mr. Daley did." (T-1857) (Emphasis added.)

Defense counsel objected to this line of argument (T-2094) because such argument incorrectly places the jury in the position of assessing a defendant's actions and intentions against the values of the individual venireman. By comparing Daley's ability to be a non-Hobbs Act donee of driveway materials against similar opportunities of an individual juror, Mr. Wohl chose to have the jury ignore Daley's long-established ties in the community and the multitude of good will which he built up over years in the upstate trucking field, and improperly inflamed the fact finders against Daley. See, United States v. White, 486 F.2d 204, 207 (2d Cir. 1973); United States v. Bugros, 304 F.2d 177 (2d Cir. 1962).

However proper it may be to argue that a defendant's contentions are not credible, it is quite another, and quite wrong, to premise such an argument based upon the reasonable expectations and actions of a lay juror. To do so is to comment upon matters and standards which are outside the record and beyond the scope of appellate review. More than that, it constitutes a denial of the right of confrontation because each juror possesses his own expectations and morality.

Arguments of this nature should not be tolerated not merely because it ill-behooves the Government to make them, but because it places the jury into the calculus of guilt and forces the juror to compare the defendant's conduct to his own. Such a jury room morality contest is constitutionally improper and requires a new trial. C.f., Perry v. Mulligan, 399 F.Supp. 1285 (D.N.J. 1975). Only a reversal will drive this lesson home with appropriate force, particularly when, as in the case at bar, the trial court declined to admonish the jury to disregard this episode of rhetorical excess.

POINT VI

THE IMPROPER USE OF HEARSAY EVIDENCE RE- QUIRES THE DISMISSAL OF THE INDICTMENT

While the use of hearsay evidence before the Grand Jury is clearly not legally improper (Costello v. United States, 350 U.S. 359 (1956)), a line of developing case law is forming disproving the use of hearsay. Hence, the Grand Jurors should be affirmatively advised that they are receiving hearsay evidence so that they are aware of "the shoddy merchandise they are getting so that they can seek something better if they wish". See, United States v. Payton, 363 F.2d 966, 1000 (2d Cir. 1966).

Thus, in United States v. Russo, 413 F.2d 432, 435 (2d Cir. 1969), the Court of Appeals held that an indictment based upon hearsay need not be vacated if the prosecutor makes it clear that it is the recipient of hearsay "...at least where there is good reason not to call a particular witness. See also United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966), cert. dism'd., 389 U.S. 80 (1967)."

Likewise, in United States v. Esteppa, 471 F.2d 1132 (2d Cir. 1972), the improper use of Government agents with only a peripheral knowledge gained from hearsay sources to supply the elements of the Government's case was found to be an improper use of the grand jury.

In the case at bar, the Government has responded, through the testimony of Assistant United States Attorney Jaffe, that while only one "live" witness was called before the indicting 1976 Grand Jury, the Grand Jury listened to the prior testimony of all defendant-favoring witnesses. In this connection it is important to ascertain that the reading of the prior 1973 testimony was both accurate and complete and that a transcribed record of the reading was made. See, United States v. Crutchley, 502 F.2d 1195, 1199-1200 (3d Cir. 1974); United States v. Gallo, 394 F.Supp. 310 (D. Conn. 1975).

In addition, it is also important to ascertain whether all comments and colloquy between the prosecutor's office and the grand jurors was recorded. As the Court in United States v. Messitte, 324 F.Supp. 334 (S.D.N.Y. 1971) noted, remarks by prosecutors to grand jurors are usual and frequently not recorded. In Messitte, Judge Bryan declined to dismiss the indictment because the defendant failed to demonstrate prejudice.

Because the statutes in question were highly technical and especially in light of the fact that no indictment was returned by the the 1973 Grand Jury, it is important to evaluate the legal instructions proffered to the grand jurors to insure that they both conformed to law and were fair. Should the Assistant United States Attorney who sought this indictment have either abused the Grand Jury and his quasi-judicial function by the manner in which he presented evidence or instructed

the Grand Jury on the law, a prime occasion for the Court's resort to its supervisory power would be presented.*

Accordingly we respectfully ask the Court to conduct an in camera review of the Grand Jury minutes to insure that Daley's right to due process was not violated by the manner of the Grand Jury presentation.

*This result would be particularly warranted in light of the recordation warning the Court gave the Southern District prosecutor's office in United States v. Peden, 472 F.2d 583, 584 (2d Cir. 1973).

CONCLUSION

THE JUDGMENT OF CONVICTION APPEALED FROM SHOULD
BE REVERSED AND REMANDED TO DISTRICT COURT FOR
A NEW TRIAL. COUNTS ONE AND TWO SHOULD BE
DISMISSED.

Respectfully submitted,

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MAILED
JUL 12 1977
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